

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 3, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

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No. 95-0683

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

In re the Marriage of:

JAMES ELMER LEFEBER,

Petitioner-Appellant,

v.

BONNIE JEAN LEFEBER,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. James Elmer Lefebber appeals from a judgment divorcing him from Bonnie Jean Lefebber. On appeal, he challenges the property division, maintenance and child support provisions of the judgment. Although we conclude that the circuit court properly exercised its discretion in determining child support and maintenance, we reverse and remand for further

proceedings as necessary to address an issue relating to the property division: interest on a \$17,000 debt secured by a second mortgage to James' parents.

PROPERTY DIVISION

James argues that the trial court erroneously exercised its discretion in determining the amount of and interest owed on funds loaned to the parties by James' parents. James also contests the court's valuation of the parties' livestock, farm machinery and equipment.

Property division is within the circuit court's discretion, and we will sustain its decision if the court examined the relevant facts, applied a proper legal standard and reached a reasonable conclusion using a demonstrated rational process. See *Sharon v. Sharon*, 178 Wis.2d 481, 488, 504 N.W.2d 415, 418 (Ct. App. 1993). In dividing the parties' property, the court is required to consider the factors set out in § 767.255(3), STATS. The valuation of a particular marital asset is a finding of fact which we will not upset unless it is clearly erroneous. *Liddle v. Liddle*, 140 Wis.2d 132, 136, 410 N.W.2d 196, 198 (Ct. App. 1987); see also § 805.17(2), STATS.

At trial, Bonnie presented evidence that the debt to James' parents was \$17,000. She submitted a financial statement James signed under oath in April 1992 for First Wisconsin National Bank indicating that this debt was \$17,000.¹ James and his father testified that the senior Lefebers lent additional sums totaling \$62,124 which, with 6% interest, amounted to \$235,392 owed.

The trial court found that no amount had ever been repaid on the debt, that Bonnie was "a fifth wheel" in financial dealings between James and his family, and that the alleged \$235,392 debt was "nothing more than an attempt to increase the liability of [James] and [Bonnie] and thereby deplete or diminish the marital estate." The court also considered that if it were to value this debt at the full amount urged by James and his father, James "would receive

¹ The note and mortgage to James' parents were executed in April 1976 for \$28,000 at 6% interest. The note was renewed twice.

a substantial asset for which there is no testimony that he has to or will ever repay. This would certainly constitute a hardship on [Bonnie] and a windfall to [James], which would result in a complete inequitable distribution of the marital estate." The court found that including the \$235,392 debt in the property division would deny Bonnie's contribution to the value of the parties' farm through her efforts during the marriage and result in an unequal and unfair division of the marital estate.

The record supports the trial court's findings regarding the debt to James' parents. The trial court found that Bonnie's testimony was more credible than that of James and his father as to how the debt was incurred, the amount of the debt and whether the debt was intended to be repaid. As the finder of fact, it was the trial court's function to make this credibility assessment. See *Village of Big Bend v. Anderson*, 103 Wis.2d 403, 410, 308 N.W.2d 887, 891 (Ct. App. 1981).

Although we have upheld the trial court's discretionary determination regarding the value of the second mortgage debt to the senior Lefebers, we reverse and remand to permit the trial court to consider interest on this debt for purposes of the property division. It was undisputed at trial that the original April 1976 \$28,000 note bore interest at the rate of 6%. In their testimony, the parties and James' father, Roy Lefeber, referred to the 6% interest requirement; the parties' posttrial position statements also referred to the 6% interest provision. However, the trial court's memorandum decision does not address interest on the \$17,000 balance due.

We reject James' challenge to the trial court's decision to value the parties' cash-on-hand as of the July 19, 1993 temporary hearing rather than as of the October 5, 1994 trial. The court found that the amount of cash-on-hand at the trial had been reduced by several thousand dollars since the temporary hearing and that "[i]t was apparent from the testimony that cash had been withdrawn from this account [by James] to reduce this asset at the time of the divorce." This determination required an assessment of the credibility of the witnesses. We see no error in the trial court's exercise of its discretion in this regard.

James also disputes the trial court's valuation of livestock, farm machinery and equipment. At trial, James testified that he agreed with the values contained in an appraisal prepared by O'Brien Brothers; however, the appraisers did not testify. O'Brien's appraisal valued the machinery and equipment at \$58,625 and the livestock at \$85,100. Bonnie presented the testimony of her appraiser, Dennis Badtke, that the machinery and equipment were worth \$56,550 and the livestock was worth \$113,000. The trial court made a credibility determination and accepted Badtke's values. It was within the trial court's authority to make this determination, and the record supports the trial court's decision.

CHILD SUPPORT AND MAINTENANCE

James contests the trial court's finding that he could realize net income of \$39,919 in 1994 and subsequent years for purposes of calculating child support and maintenance. James argues that the court's use of the \$39,919 figure for his 1994 income was without any rational basis, particularly since his tax returns for the seven preceding years did not indicate income approaching that level.

In arriving at the \$39,919 figure, the trial court stated that it was "[u]sing the previous years of income as examples" While the trial court did not so state, it is clear that it relied upon Bonnie's Exhibit 13, which was her estimate of James' profit or loss from farming for 1994. Bonnie testified that Exhibit 13 was prepared using James' September 30, 1994, third-quarter income statement. Projections regarding income and expenses for 1994 required estimating fourth-quarter income and expenses. This was done by averaging the previous three-quarters' income and expenses and adding the averages to the figures on James' third-quarter 1994 income statement.²

² James contends that Exhibit 13 was accepted into evidence without foundation. However, there was no objection at trial to the admissibility of Exhibit 13 or to the testimony relating to it. Therefore, this claim is waived. See *State v. Hartman*, 145 Wis.2d 1, 9-10, 426 N.W.2d 320, 323 (1988).

James complains that Exhibit 13 does not take into consideration approximately \$30,000 in farm accounts payable. We disagree. In using actual expense figures from James' third-quarter income statement and estimating the fourth-quarter expenses and income to arrive at a total estimate for 1994, Exhibit 13 necessarily took into account that additional expenses (and hence accounts payable) would be generated in 1994.

James also complains that Exhibit 13 improperly added in depreciation, thereby depriving him of that deduction from his income. Although the trial court agreed that James should not receive a depreciation deduction, it appears from the trial court's memorandum decision and the exhibits presented at trial that the court did not actually deprive James of the depreciation deduction when it estimated his 1994 income. Bonnie's Exhibit 14 indicated that if depreciation were added in for 1994, James' total income would be \$58,115. The \$39,919 figure used by the trial court does not reflect added in depreciation.³

We turn to James' challenge to the trial court's requirement that he pay Bonnie \$100 per week maintenance and its decision to relieve Bonnie of the obligation to pay child support. The trial court discussed the fairness and support objectives of maintenance. *See LaRocque v. LaRocque*, 139 Wis.2d 23, 33, 406 N.W.2d 736, 740 (1987). The court considered that this was a lengthy marriage (twenty-three years), that the parties had reached a stage in life where they could enjoy an enhanced standard of living, and that it could not require Bonnie to rely upon her property division in lieu of maintenance.

The trial court further noted that Bonnie desired \$100 per week in maintenance as long as she was not required to pay child support,⁴ that Bonnie's

³ Even if the trial court did deprive James of the depreciation deduction in determining his 1994 income, such would have been within the court's discretion. Whether depreciation is to be included for purposes of evaluating income "is discretionary depending upon the facts of the case." *Overson v. Overson*, 140 Wis.2d 752, 761, 412 N.W.2d 896, 899 (Ct. App. 1987); *see also State ex rel. S.M.D. v. F.D.L.*, 125 Wis.2d 529, 535, 372 N.W.2d 921, 923 (Ct. App. 1985) (calculating income without a depreciation deduction can be an appropriate exercise of discretion).

⁴ The minor children were residing on the farm with James at the time of trial.

budget indicated a shortfall of \$78 per month, and that part of her monthly income was overtime which was not guaranteed to her.⁵ The court noted that if fairness required, it could set maintenance at a level exceeding Bonnie's budget. *See Hefty v. Hefty*, 172 Wis.2d 124, 135-36, 493 N.W.2d 33, 37 (1992). The court also considered that James has the ability to increase his farm income and that Bonnie's ability to increase her income is limited in the absence of a post-high school education. The court also considered Bonnie's financial needs and what would be required to permit her to live at the same standard of living enjoyed during the marriage.

The court then turned to the issue of child support and noted that it could depart from the percentage standard child support guidelines under § 767.25, STATS., if it found that use of the percentage standard would be unfair to the children or to either of the parties. *See* § 767.25(1m). The court noted that child support is intended to maintain the children at the economic level they would have enjoyed in the absence of divorce. The court specifically found in this case that the children were living in the same economic circumstances they enjoyed prior to the divorce. The court concluded that ordering Bonnie to pay child support was not warranted given the financial hardship to her and the fact that the children had not suffered economically as a result of the divorce. The court further found that Bonnie's "relinquishment of a larger maintenance payment for the extinguishment of any support payment is fair and equitable"

As a general rule, we do not endorse setting-off maintenance and child support in the manner employed by the trial court. However, the court's decision to do so in this case can be upheld because of the court's specific finding that the children's economic condition had not suffered as a result of the divorce. The court had a reasonable basis for relieving Bonnie of child support and for ordering James to pay Bonnie \$100 per week in maintenance.

James argues that the trial court did not consider his inability to pay maintenance and Bonnie's lack of need. We have already addressed the maintenance factors as they apply to Bonnie. James' contention that he is unable to pay is based upon his rejection of the trial court's estimation of his

⁵ It is uncontested that Bonnie's income is \$22,056 per year.

1994 income at \$39,919. Because we have already sustained the trial court's income determination as not clearly erroneous, we need not address this argument.

In sum, we affirm the trial court's determinations on maintenance and child support but reverse and remand on the property division to permit the court an opportunity to address the issue of interest on the \$17,000 second mortgage debt. The court has discretion to address this issue with or without further proceedings. The court also has discretion to address any other aspects of the judgment of divorce affected by any subsequent interest determination. However, we do not require or invite further proceedings relating to nonproperty division aspects of the judgment of divorce.

No costs to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.